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ALEXANDER L. STEVAS,
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NO. 80-1860

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

JIMMY BEAN,

Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the forceful entry of a private home eight days after an offense to arrest a suspect without a warrant and in the absence of exigent circumstances is an illegal seizure of a person in violation of the Fourth Amendment to the United States Constitution.

PARTIES OF PROCEEDING IN THE SUPREME COURT OF ILLINOIS

Petitioners and their respective counsel were:

A. Jimmy Bean

Attorney: Brown, Goodman and Carper, Ltd.
One North LaSalle Street
Chicago, Illinois

B. Jesse Byrd and Frank Byrd

Attorney: James Doherty
Public Defender of
Cook County, Illinois
Daley Center
Chicago, Illinois

Respondent: People of State of Illinois

Attorney: Hon. Tyrone Fahner
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People v. Bean, 73 Ill. App. 3d 918 (1979) A18-A41

TABLE OF AUTHORITIES

Coolidge v. New Hampshire, 403 U.S. 443 at 477-478

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Dorman v. United States, 435 F 2d 385 (1970)

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United States v. Reed, 572 F 2d 412 (1978)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO._____

JIMMY BEAN - - - - Petitioner

vs.

PEOPLE TO THE STATE
OF ILLINOIS - - - Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Petitioner JIMMY BEAN respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Illinois, affirming the order of the Appellate Court of Illinois, First District reversing the order of the Circuit Court of Cook County, Illinois,quashing the arrest of the Petitioner and suppressing statements made subsequent to the arrest.

OPINION BELOW

The opinion of the Supreme Court of Illinois affirming the judgment and order of the Appellate Court of Illinois, First District, is reported at 84 Ill. 2d 64 and a copy of said opinion is attached hereto as Appendis "A." The opinion of the Appellate Court of Illinois, First District reversing the order of the Circuit Court of Cook County, Illinois, quashing the arrest of Petitioner herein and suppressing as evidence statements made subsequent to the quashed arrest is reported at 73 Ill. App. 3d 918, and a copy of said opinion is attached hereto as Appendix "B." The order of the Circuit Court of Cook County, Illinois, quashing the arrest of Petitioner and suppressing as evidence statements subsequently made was an oral order and the decision is unreported.

JURISDICTION

This Honorable Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3). The judgment of the Supreme Court of Illinois was entered on February 20, 1981, and this Petition for Writ of Certiorari was filed within 60 days of that date.

CONSTITUTIONAL PROVISIONS UPON WHICH PETITIONER RELIES

Amendment 4 To The United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14 Section 1 to the United States Consitution:

Section 1. Citizens of the United States all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENTS OF FACTS

On March 13, 1975, the home of Jimmy Bean, the Petitioner herein, was forcibly searched and the Petitioner seized by plain clothes detectives, who did not possess an arrest warrant nor a search warrant. The officers arrested the Petitioner for an offense on March 13, 1975, for an offense which was occurred on March 5, 1975.

Mrs. Lillie Mae Bean, the mother of the Petitioner, Jimmy Bean, answered a knock on the door at approximately 8:00 a.m., on March 13, 1975, at their home at 4211 West Gladys, Chicago, Illinois. Upon opening the door, Mrs. Bean was confronted by two (2) plain clothes police officers that said to her, "Police Officers, we want to see Jimmy." Mrs. Bean admitted the two (2) officers into the vestibule just inside the door and asked them to wait there until she obtained a robe to cover her nightgown. Upon returning with her robe, in response to one (1) officer's demand to see Jimmy, Mrs. Bean told the officers to wait and that she would go and get him.

At that point, one of the officers Mrs. Bean described as the shorter of the two (2) officers at her front door and having sandy hair and a sandy mustache rushed past Mrs. Bean with his service

revolver drawn. Thereupon, Mrs. Bean told the officers, "he was going nowhere," however the officer beat Mrs. Bean to the Petitioner's bedroom and told the Petitioner to get out of bed.

Prior to the arrest of the Petitioner on March 13, 1975, an armed robbery had occurred on March 5, 1975 and on March 5, 1975, an alleged witness, purporting to be Lucinda Birmingham, informed officers arriving at the scene that she has seen Jimmy Bean run from the vicinity of the offense after two (2) other persons exited from the premises where the offense is purported to have occurred.

On March 6, 1975, Officer Lahn spoke by telephone with a person he assumed to be Lucinda Birmingham and it was related to him that Jimmy Bean had been observed leaving the vicinity where the offense occurred. Subsequent to this conversation, Officer Lahm checked the "Alpha File"

of the Chicago Police Department to determine what if any information was available concerning Jimmy Bean. From the "Alpha File," Officer Lahm did obtain certain date concerning Mr. Bean including an address.

By March 13, 1975, Officer Lahm had not obtained an arrest warrant for Jimmy Bean nor had he obtained a search warrant for the home of Jimmy Bean at 4211 West Gladys, Chicago, Illinois, to arrest Jimmy in his home.

The Constitutional question raised herein was raised in the trial court, namely the Circuit Court of Cook County, Illinois, prior to trial by a Motion To Quash Arrest and Suppress Evidence filed by the Petitioner. The Trial Court conducted an evidentiary hearing on the Petitioner's motion and at the conclusion of the evidence sustained the motion and quashed the arrest and suppressed as

evidence the subsequent in-custody statements of the Petitioner.

The issue was thereafter presented to the Appellate Court of Illinois, First District, by the Respondent, the People of the State of Illinois, filing a direct appeal of the order of the Trial Court quashing the arrest and suppressing as evidence statements of the Petitioner made subsequent to the arrest. As heretofore indicated the Appellate Court of Illinois, First District, reversed the order of the Trial Court and remanded the cause with instructions.

Thereafter, within the time allowed, the Petitioner herein presented the issue to the Supreme Court of Illinois by filing a Petition for Leave to Appeal and leave to appeal was allowed by the Supreme Court of Illinois and ultimately said Court affirmed the judgment of the Appellate Court of Illinois.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

The principal issue in the case at bar is the Constitutional validity of the Petitioner's arrest and the focus of the inquiry is upon the propriety of the arresting officer's entry into the Petitioner's home and his seizure from that home without a warrant.

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be sucure in their home, houses, papers and effects, against unreasonable searched ans seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In Coolidge v. New Hamsphire, 403 U.S. 443 at 477-478. 91 S.CT. 2022, Justice White observed:

> "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is

per se ligitimate is in fundamental conflict with the basic principle of the Fourth Amendment Law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined 'exigent circumstances'."

More recently, this Honorable Court in Payton v. New York, 63 L.Ed. 2d 639 (1980) held that police are prohibited by the Fourth Amendment to the United States Consitution from making a warrantless and nonconsenual entry into a suspect's home in order to make a routine felony arrest. The court also reiterated previous interpretations of the Fourth Amendment that its protections are applicable to the seizure of persons from a home as well as the seizure of tangible objects, and in so holding expressly rejected the contention of the People of New York that there was a significant distinction to be drawn between an entry into a home to search for tangible objects

and an entry into a home to search for a person. The language of the Fourth Amendment does not distinguish between "persons" and "things" in guaranteeing the right to be secure agaisnt unreasonable searches and seizures. The Amendment by its own terms requires that whether persons or things are to be seized the warrant must describe the place to be searched. In the case at bar the testimony of Officer Lahm clearly demonstrated that he went to the residence of the Petitioner to seize the person of the Petitioner. For Officer Lahm states that, "I was there to arrest him." (R.V.1-44), and unquestionably the officer possessed no arrest warrant.

This Honorable Court's opinion in Payton v. New York did not undertake to decide whether or not exigent circumstances wer justification for a warrantless arrest in a person's home, however, in the humble opinion of this author this Court recognized

in Wardent v. Hayden, 87 S.Ct. 1642, 19 L.Ed. 2d 782 (1967) hot pursuit as a justification for the entry of law enforcement officers into a home without warrant. An as previously pointed out, in the case at bar, the officers arrested the Petitioner in his home eight days after the offense even though the officers knew they were seeking Petitioner on the day of the offense.

Since this Honorable Court's recognition of hot pursuit as a justification for a warrantless entry of a home by law enforcement officers, inferior couts have developed a doctrine of "exigent circumstances" that embodies a series of seven factors to be considered in determining whether exigent curcumstances exist which justify a warrantless intrusion into a citizen's home. Dorman v. United States, 140 U.S. App. D.C. 312, 435 F.2d 385 (1970) articulates the seven factors as follows: (1) whether a violent crime is involved;

(2) that the suspect is reasonable believed to be armed; (3) that there exists not merely the minumum of probable cause that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including reasonable trustworthy information, to believe that the suspect committed the crime; (4) a strong reason to believe that the suspect is in the premises entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; (6) the circumstances that the entry though not consented is made peaceable; (7) the time of entry.

Applying the considerations that are material in determining if the circumstances of a situation exigent circumstances to the case at bar, it is abundantly clear that exigent circumstances which would excuse the Fourth Amendment requirements of a warrant were not present here.

Conceding the offense charged, armed robbery, is a grave one, as to the second consideration, namely, whether the Petitioner was armed, contrary to the conclusion reached by the Supreme Court of Illinois, Officer Lahm did not believe the Petitioner to be armed, for the officer knew from his conversation with a witness that the person at the scene thought to be Petitioner was not armed.

The third consideration to be applied in determining whether there are exigent circumstances to justify an invasion into a citizen's home is whether there exists not merely the minimum probable cause that is required even when a warrant has been issued but beyond that a clear showing of probable cause including "reasonably trustworthy information", to believe that the suspect committed the offense. In the case at bar there does not even exist "mere probable cause" for an arrest. The

officer effecting the arrest has no personal knowledge of facts which would tend to connect the Petitioner with the offense. Officer Lahm merely called a telephone number he obtained from a police report. The record is clear that he did not even know the address to which the telephone number he dialed correspond nor did he even attempt to check.

Even more shocking is the fact that the officer is not even certain that the person he spoke with on the telephone was Lucinda Bermingham, the purported informant. Not only did he not know that address at which the telephone number was located but he didn't even know and didn't even attempt to learn to whom the telephone was listed. The only link between the telephone number and the same Lucinda Birmingham is a voice that the officer has never heard before saying that it is Lucinda Birmingham. But the lack of

trustwothiness does not stop there because unlike what a reasonable person would have done, Officer Lahm never personally interview the person purported to be Lucinda Birmingham, never checked to determine if in a fact there was a Lucinda Birmingham, never checked to determine if a Lucinda Birmingham lived at the address listed on the police report and never asked the person he spoke with on the telephone how old she was, where she lived, who her parents were, what her occupation was, whether she had ever furnished the police information previously or even how long it had been since she had seen the Petitioner prior to his alleged involvement with an offense on March 5, 1976.

Obviously, evidence which does not support a finding of mere probable cause does not meet criteria of Dorman which provided that more than the minimum of probable cause is required when an

arrest without a warrant is effected in a home. Under such circumstances, a clear showing of probable cuase is required, including reasonable trustworthy information to believe the suspect committed the crime. In the case at bar, the prosecution failed to establish probable cause for arrest outside of a home and therefore, having failed the lesser standard, failed to fulfill the stricter requirement of Dorman with respect to probable cause for an arrest without warrant in a home.

The Fourth consideration that is material in determining whether an arrest of a suspect in his home without a warrant is whether there is strong reason to believe that the suspect is in the premises being entered. This consideration in the case at bar is easily resolved in favor of the Petitioner by the testimony of Officer Lahm. Defense counsel posed the following question to Officer Lahm and

elicited the following answers:

Q. "Now, Officer, on the morning of March 13th when you approached the Bean residence, did you know that Jimmy Bean was in the house at that time?

A. No.

Q. Where you making a general inquiry or was your purpose in going there to make an arrest?

A. I was there to arrest him.

Q. So that when you knocked on the door, your intention was to effect an arrest if he was home?

A. Yes, Sir." (R.V. 1-44-45)

The answer of the officer to the inquiry of whether he knew Jimmy Bean was on the premises is unqualified and the record is barren of any other evidence that would establish a strong reason to believe that Jimmy Bean was in te premises being entered on March 13, 1975. Clearly the officer was doing nothing more than

checking out a lead obtained from old police (R.V. 1-32) and school records (R.V.1-112) and the testimony of an alleged informant witness, that she has once known the vicinity of his address when she had attended school with the Petitioner (R.V.1-38). However, the evidence adduced by the prosecution did not establish the age of the alleged witness at the time of the telephone conversation (R.V. 1-38) nor did it establish how long ago the alleged witness had attended school with the Petitioner. However, since according to Officer Lahm's testimony the witness used the past tense of the verb so one can reasonable conclude that at the time of the offense the alleged witness was not going to school with the Petitioner.

Certainly, old records and conversations which indicates a person's last know address do not satisfy the Dorman standard of

"strong reason to believe the suspect is in the premises being entered." Reason to believe that a person was at a location a year or two years ago is now insufficient reason to enter a home in violation of the Fourth Amendment. Such an interpretation would emasculate the protection sought to be afforded by the Fourth Amendment. The Petitioner humbly assets that "strong reason" not only means trustworthy and reliable reasons but also fresh evidence that at the moment of the entry by law enforcement officers that the suspect is on the premises.

The fifth consideration of Dorman is the likelihood that the suspect will escape if not swiftly apprehended. In the case at bar, the record is barren of any evidence that the Petitioner might escape apprehension unless the home was forcibly invaded without a warrant for arrest of the Petitioner. On the Contrary the evidence indicated

that the Petitioner was still occupying a residence he had occupied for eight (8) years (R.V. 1-8) and even more significantly he was found there some eight (8) days after the offense, not making hasty preparation for an escape but sleeping.

The sixth Dorman consideration is the circumstances of the entry; whether the entry by law enforcement officers was peaceable or forceful. In the case at bar, the officers never gave Jimmy Bean an opportunity to surrender himself by merely stating their business and requesting that he be summonded to the door. Mrs. Bean testified credibly and reliable on both direction (R.V. 1-5) and cross (R.V. 1-16) examination as to the forcible nature of the entry and arrest. Mrs. Bean asked the officers to wait at the vestibule just inside the entrance while sha went to get Jimmy Bean. At that time the officer she describes as short, sandy hair and mustache rushed past her with his gun drawn and

into the bedroom where Jimmy Bean was sleeping, (R.V. 1-5-6) Mrs. Bean's testimony relating the incident is detailed and relates the events chronologically.

In United States v. Reed, 572 F 2d 412, 422 (1975) the Second Circuit Court of Appeals reviewed the authorities concerning one's expectation of privacy in their home and the gravity of a governmental intrustion into one's home and having viewed the authorities at page 423 found that invasion by law enforcement was an invasion of one's expectation of privacy and noted that merely being arrested for most persons is an "awesome and frightening experience." In the case at bar, the conduct of the police was an abomination. The shock of the police invading and rushing into the Petitioner's bedroom without first announcing their purpose was visibly and readily apparent in the sobbing of Mrs. Bean (R.V. 1-6) but certainly the shock of the police

conduct was no less to be youthful petitioner.

The seventh and final ocnsideration set out in Dorman to be taken into consideration in determining if "exigent circumstances" exist which would justify a warrantless intrusion into a home in violation of the Fourth Amendment is the time of the entry. In the case at bar, the entry was at approximately 8:00 a.m. While on its face, it may not appear patently unreasonable, in the circumstances of this case, it was unreasonable. It must be remembered that this was a warrantless arrest and seizure of an offense that has occurred eight (8) days previous and on the very day of the offense the name Jimmy Bean came to the attention of the police. The following day the police undertook a cause of conduct which ultimately resulted in gaining knowledge of the last known address for a Jimmy Bean. The

opportunities for the police to obtain a warrant during those eight (8) days were so great and innumerable, especially considering the magnitude of the criminal court system existing in the city of Chicago. That it is what makes this violation of the Fourth Amendment so intolerable in this instance. The Court in Dorman, 435 2d 385 (1970) upheld an arrest without a warrant in a home but the situation differed drastically form the situation in the case at bar. In Dorman, the arrest was in close proximity to learning of the identification of offender, the efforts by law enforcement officials to obtain a warrant were diligent and from a practical standpoint, exhaustive and the offense had recently occurred. Those factors are not present in the case at bar, especially the efforts which were expended as in Dorman to obtain an warrant.

Further, in the case at bar, the

presecution cannot be heard to complaint that the hour of the day prevented the obtaining of a warrant for at that time or shortly thereafter a judge would be easily located and due to the delay between the arrest and the offense any argument that the suspect might flee the jurisdiction would be firvolous. In Chappell vs. United States, 342 F. 2d 935, 938, 119 U.S. App. D.C. 356 (1953) the Court noted, "That delay may be encountered, however, is not controlling on whether a warrant is required; securing a warrant always requires some additional time."

The Supreme Court of Illinois avoided the holding of this Court in Payton and also avoided the teaching of Dorman, although admittedly, the doctrine of exigent circumstances is not a Constitutional requiremant. However, it is significant to note that the Supreme Court of Illinois has created its own exception to the Constitutional

requirement established by this Court is Payton. The Supreme Court of Illinois concluded that when police officers are conditionally admitted into a foyer and instructed to wait in the foyer by the Petitioner's mother until she puts on her bathrobe but rather than waiting as instructed, the police officers draw their guns and forcibly rush past Petitioner's mother to search other rooms of the home for the Petitioner herein, then in that instance, an arrest warrant is not required, although the arrest is taking place eight days after the offense in the Petitioner's home. The Supreme Court of Illinois implicitly concludes without reasoning or other comment that police officers charging through a home with guns drawn to make an arrest is a consensual entry. The Court also cites that for an entry to be consensual it must be voluntary. A conclusion that the entry was voluntary where Petitioner's mother instructed the officers to remain at

the foyer but instead the police officers draw guns and rush into other rooms to effect an arrest is clearly contrary to the evidence adduced.

It is significant to note that the factual situation contained in United States v. Reed, 572 F. 2d 412, is similar in may respects to the case at bar. In Reed, the entry and arrest into the defendant's home was a sonsensual entry allowed by the defendant herself and thereupon the defendant was arrested. The Second Circuit Court of Appeals concluded that Reed was arrested in a place which she was entitled to a reasonable expectation of privacy and a place protected by the Fourth Amendment. At page 423 of the opinion the Second Circuit also concluded that Reed's privacy interest was invaded by government agents.

In Payton, this Honorable Court concurred in the conclusion reached in Reed at page 423, that

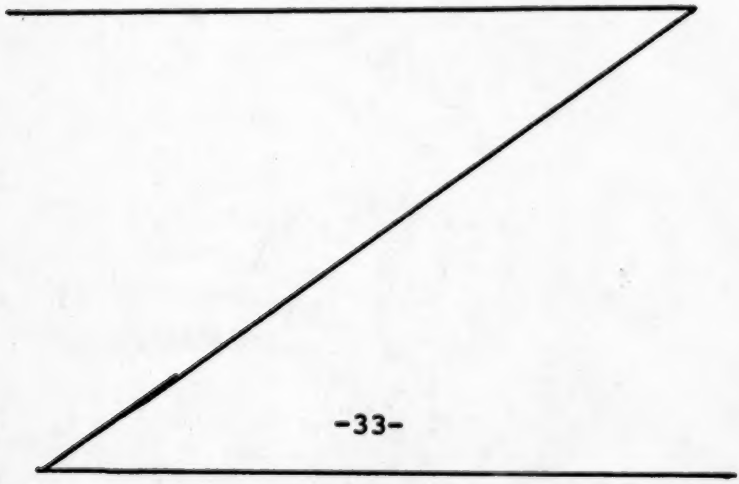
> "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when probable cause is clearly present."

The Petitioner, Jimmy Bean, respectfully disagrees with the Supreme Court of Illinois that in the absence of exigent circumstances that the holding of Payton need not be followed in Illinois. The Constitutional issue raised by this Petition is of such significance that the matter be considered by this Honorable Court. In an urban society the question of the legality of arrest by police agencies in private homes is one which arises with resurring frequency. Until it is established that the Illinois Courts cannot erode and avoid the holding of this Court's holding in Payton the Constitutional right of Illinois citizens to be secure in their homes from unreasonable searches

seizures by police agencies will continue to be violated.

CONCLUSION

Wherefore, Petitioner, Jimmy Bean, respectfully prays of this Honorable Court that certiorari be granted and that a Writ of Certiorari issue to the Supreme Court of Illinois and thereafter that this Honorable Court of Illinois and remand the cause to the Supreme Court of Illinois and affirm the order of the Circuit Court of Cook County, Illinois, quashing the arrest of the



Petitioner, Jimmy Bean, and suppressing evidence.

Respectfully submitted,

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No. 52385

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appelle,	)	Appeal from Appellate Court
vs.	)	First District
JIMMY BEAN, JESSE BYRD and FRANK BYRD,	)	
Defendant-Appellant,	)	

Opinion Entered February 20, 1981

MR. JUSTICE MORAN delivered the opinion of the Court:

Defendants, Jimmy Bean, Jessie Byrd, and Frank Byrd, were charged by indictment with two counts of armed robbery. The Circuit Court of Cook County quashed the arrest and suppressed statements of Jimmy

Bean, and quashed the arrest and suppressed the identification evidence of Jessie and Frank Byrd. Upon appeal, the appellate court reversed and remanded both causes. 73 Ill. App. 3d 918.

All three defendants contend that their arrests violated their rights guaranteed by the fourth amendment to the United States Consitution. Defendant Bean argues (1) his arrest was without probable cause and (2) the circumstances surrounding the arrest in his apartment required a warrant. Defendants Jessie and Frank Byrd assert that (1) their arrest was invalid, having occurred as a direct result of Bean's illegal arrest, and (2) in any event, the circumstances surrounding their own arrest required a warrant.

On March 5, 1975, two men, armed with a sawed-off shotgun and pistol, entered a cleaning store and took money

and phonograph records. On March 6, the investigating officer, Thomas Lahm, telephoned Lucinda Birmingham, whose name, address and telephone number had appeared on a police report of the March 5, incident. Ms. Birmingham told Offier Lahm that while she was standing across the street she observed two men come out of the clearners and join two other men who were outside. She then saw all four run from the scene. She told Lahm that one of the men who had been outside the cleaners was Jimmy Bean, with whom she had previously gone to school. She further told Lahm that Bean was 17 or 18 years old and that he lived in the vicinity of Keeler and Gladys Streets (4200 West) in Chicago.

Subsequent to this conversation, Lahm checked the police alphabetic file and discovered that a Jimmy Bean had been arrested by Oak Park police in June 1974 and had given his address as 4211 West

Gladys and learned that a Jimmy Bean went to school at Van Buren and Keeler Streets and had listed his address as 4211 West Gladys Street.

On March 13, at approximately 8:00 a.m., Lahm and Officer Korte accompanied by two other policemen arrived at 4211 WEst Gladys without a warrant. The accompanying officers went to the rear of the residence while Lahm and Korte approached the front door and knocked The mother of defendant, Mrs. Bean, testified that when she opened the door the officers showed her their badges and said, "Police officers, we want to see Jimmy." Mrs. Bean then asked them into the vestibule area; once inside, she requested the officers to wait while she left to put on a robe. The officers complied with this request. Upon here return, the officers again stated they wanted to see defendant. Mrs. Bean again asked them to wait while she went to get defendant. At this point,

Korte went past her with his gun drawn. Mrs. Bean also testified that the officers went into defendant's bedroom and told him to get dressed.

Officer Lahm testified that while they were in the apartment the defendant emerged from a bedroom. Lahm stated that he walked as far as the bedroom doorway, but did not enter the bedroom, although he could not recall whether Korte entered. Lahm informed defendant he was under arrest and then searched him for weapons. Thereafter, defendant was taken to the police car where he was advised of the constitutional rights.

Lahm furhter testified that five minutes after the arrest the defendant made an oral statement concerning the robbery. This statement was substantially the same as a written statement later made at the police station. the statements indicated that Frank and Jessie Byrd partici-

next page is no. 7

pated in the robbery with him. Following defendant's oral statement to the police, the four officers and defendant proceeded to 4132 West Van Buren, where defendants Frank and Jessie Byrd were arrested. Later that day, the Byrds tood part in a lineup and were identified as being participants in the armed robbery.

The trial court allowed Beans's motion to quash his arrest on the basis that no probable cause existed. One week later, the trial court entered an order to suppress both of Bean's statements as fruits of the illegal arrest. The court continued the hearing as to the voluntariness of the statements. On October 27, the trial court allowed a motion to quash the Byrd's arrests and a motion to suppress the identification evidence. This action was founded on the ground that the illegal arrest of Bean led to the arrest and identification of

the Byrds. The appellate court reversed and remanded both causes, noting that the police has probable cause to arrest Bean. In Bean's case, the appeallate court directed the trial court to conduct a hearing on the voluntariness of his in-custody statements. With respect to Jessie and Frank Byrd, the appellate court directed a hearing on the circumstances of their arrests. Defendants now appeal that decision.

We first consider defendant Bean's contention that probable cause did not exist for his arrest. He argues that Lahm's telephone conversation with a person who identified hereself as Lucinda Birmingham, the eyewitness to the crime, failed to provide trustworthy information upon which probable cause could be based.

Birmingham's name appeared as a witness on the original police report. When Lahm called her, she indentified hereself and identified Bean as one of the men who waited outside the cleaners and fled with

with the other three men. She told Lahm she had attended school with Bean and gave an approximate address of his home. The information as to Bean's school and residence was verified by a search of police files and school records. As an ordinary citizen (the record indicates no evidence that she was paid, professional informant), as well as an eyewitness to the offense, the officer was justified in relying upon Birmingham's information. (People v. Hoffman (1970), 45 Ill. 2d 221, 225-26; People v. Hester (1968), 39 Ill. 2d 489, 513-14.) Although Lahm did not personally interview Birmingham, this Court has held that a phone conversation can be the basis for establishing probable cause to arrest. (People v. Parks (1971), 48 Ill. 2d 232, 236; People v. Lucus (1968), 41 Ill. 2d 370, 375.) Under the facts and law stated, we conclude that Lahm had probable cause at the time he arrested defendant Bean.

Having ascertained the existence of probable cause, we must determine if the arrest of Bean without a warrant in his apartment violated his rights under the fourth amendment. Bean contends, under Payton v. New York (1980),--- U.S.---, 63 L. Ed. 2d 639,100 S. Ct. 1371, that even if probable cause is present, an arrest cannot be made in a person's dwelling without a warrant in the absence of exigent circumstances. In Payton, however, the Supreme Court specifically excluded from its consideration entries accompanied by consent. (445 U.S. 573, 583, 63 L. Ed. 2d 639, 649, 100 S. Ct. 1371, 1378.) In the instant case, the State contends the officer's entry was made with consent.

We agree that generally an arrest warrant is the desired means by which an individual's right to privacy is protected. (Payton v. New York (1980), 445 U.S. 573, 590, 63 L. Ed. 2d 639, 653, 100 S. Ct. 1371, 1381-82; McDonald v. United

States (1948), 335 U.S. 451, 453, 93 L. Ed. 153, 157, 69 S. Ct. 191, 192.) However, when voluntary consent is given to enter one's residence and an arrest is effected based on probable cause, the suspect's rights under the fourth amendment are not violated, even in the absence of exigent circumstances. The standard for valid consent applied by the Supreme Court in a variety of circumstances is whether that consent is voluntarily given. (Schneckloth v. Bustamonte (1973), 412 U.S. 218, 248-49, 36 L Ed. 2d 854, 875, 93 S. Ct. 2041, 2058-59; Bumper v. North Carolina (1968), 391 U.S. 543, 548, 20 L. Ed. 2d 797, 802, 88 S. Ct. 1788, 1791. See Johnson v. United States (1948), 333 U.S. 10,13, 92 L. Ed. 436,440, 68 S. Ct. 367, 368-69.) When a warrantless entry is justified by voluntary consent, that consent need not be given by defendant; it may be obtained from a third party who has control over the premises. United States

v. Matlock (1974), 415 U.S. 164, 171, 39 L. Ed. 2d 242, 249-50, 94 S. Ct. 988, 993; People v. Heflih (1978), 71 Ill. 2d 525, 541.

Here , the entry unlike in Payton, was in no way forceable. (In Payton, the police used crowbars to break down the door and in Riddick v. New York, decided with Payton, defendant's three-year-old son answered the door, whereupon the police entered, 445 U.S. 573, 583, 63 L. Ed. 2d 639, 100 S. Ct. 1371, 1378.) Nor was the entry obtained by means of deception. Compare Bumper v. North Carolina (1968), 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (consent obtained from defendant's grandmother, the owner of the home, after policeman claimed that police has a search warrant, the existence of which was not shown).

According to Mrs. Bean's own testimony, upon the officers identifying themselves and asking to see Jimmy Bean, Mrs. Bean

invited them to come inside the apartment. The officers then waited until Mrs. Bean returned with her robe. The testimony of all parties established that Mrs. Bean voluntarily invited the officers into the apartment. After she returned, and then started to leave to get the defendant, Korte went past her with his gun drawn. Whether Bean was found inside or outside his bedroom is not controlling. When officers are given consent to enter an apartment to arrest a suspect who was involved in an armed robbery, they should not be required to wait for that person (who might be armed) to approach them or possibly attempt to escape. We hold that Bean's arrest, based on probable cause and with consent to enter his apartment, was legal.

Defendants Jessie and Frank Byrd contend that their arrests occurred only as a result of Bean's oral statemnet obtained after his illegal arrest.

Consequently, they argue, their arrests and identifications also were illegal as the fruits of Bean's arrest. Having held Bean's arrest to be legal, this contention must fail.

The Byrds also argue that the circumstances surrounding their own arrest violated their fourth amendment rights. At the hearing on motions to quash their arrests and suppress their identifications, the State and the Byrds stipulated as to the following facts: (1) at the point of Bean's arrest, the police investigation had not yet focused on the Byrds, (2) within minutes of Bean's arrest, he made an oral statement naming the Byrds as participants with him in the armed robbery, (3) acting upon this statement the police then traveled to 4132 West Van Buren and there made the arrests of Jessie and Frank Byrd at approximately 8:00 a.m., and (4) the Byrds were identified in a lineup that day. The record, however, does not indicate

if the above arrest were in the Byrds' home, if the police entered the building, or if the police did enter the Byrds' home, whether such entry was with consent. Like the appellate court, we are unable to determine from the record the circumstances surrounding the Byrds' arrest.

We agree with the appellate court that these causes must be remanded to the trial court for further hearings as to the voluntariness of Bean's statements and the circumstances surrounding the arrests and identifications of Jessie and Frank Byrd.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

MR. JUSTICE SIMON took no part in the consideration or decision of this case.

MR. JUSTICE RYAN, concurring in part and dissentingin part:

I concur in the majority opinion

insofar as it relates to the defendant Jimmy Bean, but I dissent from that part of the opinion of my colleagues which remands the case of Jessie and Frank Byrd to the trial court for a determination of the circumstances surrounding their arrest.

The burden was on the Byrds to prove the illegality of their arrest. They relied, in the trial court and in our court, on the fact that Bean was illegally arrested and that Bean's statement could not supply probable cause for their warrantless arrest. The opinion dispose of this contention by finding that Bean's arrest was legal.

Whatever other reason there may be for holding the arrest of the Byrds to be illegal, the burden was on them to establish facts in support of such a determination in the trial court. The opinion of my colleagues states that we are unable to determine from the record

the circumstances surrounding the Byrds' arrest. To me, this says that the Byrds have not proved that they were illegally arrested and thus they have not sustained their burden of proof. I can see no reason for giving them another opportunity to do so. I would therefore reverse the holding of the appellate court as to the Byrds and remand their cause to the trial court for trial on the question of guilt.

MR. JUSTICE UNDERWOOD joins in this partial concurrence and partial dissent.

Fifth Division
June 29, 1979

78-875)
) Consolidated
78-876)

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellant,	)	Appeal From The Circuit Court Cook County.
vs.	)	
JIMMY BEAN, JESSIE BYRD and FRANK BYRD,	)	HONORABLE Albert Green, Judge Presiding.
Defendants-Appellees,	)	

MR. JUSTICE WILSON delivered the opinion of the Court:

This is an appeal by the State, pursuant to Supreme Court Rule 604 (A) (Ill. Rev. Stat. 1973, ch. 110A, par. 604 (a)), of the trial court's quashing of the arrest and suppressing of the statements of defendant, Jimmy Bean, and the quashing of the arrests and suppressing of the identifications of defendants. Frank and Jesse Byrd. The State contends that the trial court erred when it found that

there was no probable cause to arrest Bean in his apartment and when it based its ruling with respect to the Byrds on this erroneous finding. We reverse and remand.

On April 29, 1977, the trial court conducted a hearing on a motion to quash the arrest of defendant, Jimmy Bean. Officer Thomas Lahm testified that he had been assigned to investigate an armed robbery of a cleaning store which had occurred on March 5, 1975. Two men had gone into the cleaners with a sawed-off shotgun and a pistol and had taken records and money. On March 6, Lahm telephoned Lucinda Birmingham, whose name, address, and telephone number had appeared on a police report of the March 5 incident, and spoke to her about what had happend. She told him that while she was standing across the street from the cleaners, she saw two men run from the clearners, join two other men who were outside the

the cleaners, and then saw all of them run from the scene. After they had gone, she went into the cleaners and found out that an armed robbery had been committed. She told Lahm that one of the men who had been outside the clearners was defendant with whom she had previously go to school. She told him that defendant was 17 or 18 years old and that he lived in the vicinity of Keeler(4200 West) and Gladys.

Sometime between March 6 and March 13, Lahm checked the police "alpha file" and discovered that a person with defendant's name had been arrested for burglary by the Oak Park Police in June of 1974 and had given his address as 4211 West Gladys. Although Lahm could not recall precisely when he checked the alpha file, he stated that it normally takes anywhere from a couple of minutes to a couple of hours to make the check. Also, between March 6 and March 13, Lahm visited schools in the

area of 4211 West Gldays and he learned that defendant had gone to a school at Van Buren and Keeler and had listed his address as 4211 West Gladys.

At approximately 8 a.m., on March 13, Lahm and three other officers arrived at 4211 West Gladys without a warrant. Lahm said that he went there to arrest defendant, but he also said that he was not sure if defendant would be there. He went to the front of the house with one of the officers and the other officers went to the rear. After he had knocked on the door and announced his office, defendant's mother came to the door. Lahm asked here if her son lived there and if he could talk to him. She permitted Lahm and the other officer to enter the apartment after she had dressed. When they entered the apartment, neither of them had his gun drawn. Lahm said that he never did draw his gun while he was in the apartment because he never knew

that defendant would be armed. He first testified that defendant's mother told him that defendant was in the bedroom. Later, he testified that he was not sure if she told him that defendant was in the bedroom. In either event, he did say that defendant did come out of the bedroom. He told defendant that he was under arrest for the robbery of the cleaners. Lahm stated that he never entered the bedroom to make the arrest.

Lillie Bean, denfendant's mother, testified that she only permitted the plain clothes police officers to enter the vestibule to her apartment and told them to wait there until she put on her robe. After she had put her robe on, she told them that she would go and get her son. At that point, one of the officers ran past her with his gun in hand. She asked him where he was going, and when hedid not stop, she began crying. She asked the officers what they wanted with

her son, but they offered no explanation. The officers then went into defendant's bedroom and told him to get out of bed. They then brought defendant into the living room and told Mrs. Bean that they were arresting him for armed robbery.

After hearing the testimony, the trial court found no probable cause and sustained the motion to quash the arrest.

On May 6, 1977, the trial court held a hearing on a motion to suppress certian statements given by defendant after his arrest. Officer Lahm testified that give minutes after the arrest, defendant gave him an oral statement. After he had taken him to the police station, defendant gave a written statement containing substantially the same information as was contained in the earlier oral statement.

At the close of the May hearing, the trial court entered an order sustaining the motion to suppress the

statements as fruits of the illegal arrest. The court continued, however, a question concerning the voluntariness of the statements.

On October 27, the trial court commenced a hearing on a motion to quash the arrest and suppress the identification of defendants, Frank and Jesse Byrd. At the hearing, it was stipulated that when the police arrested defendant, Jimmy Bean, their investigations had not yet focused on Frank and Jesse Byrd. After Bean's arrest, he gave a statement that the Byrds participated in the armed robbery with him. The Byrds were arrested at 4132 West Van Buren ten minutes after this statement had been given. Later in the day, the Byrds took part in a lineup and were identified as being participants in the armed robbery.

After this stipulation was read, the trial court sustained the motion to quash the arrests and suppress the

identifications on grounds that the illegal arrest of Bean led to the arrest and identification of the Byrds.

OPINION

The State contends that the trial court erred when it quashed Bean's arrest and suppressed his statements because there was probable cause to arrest him in his apartment. It also contends that since there was probable cause to arrest Bean, the trial court's ruling sustaining the Byrds' motion to quash and suppress should be reversed since it was based on the erroneous ruling that Bean's arrest was illegal. We agree with both of the State's contentions.

I

The State's contention actually raises two separate questions: (1) whether the police had probable cause to arrest Bean on March 13; and (2) whether probable cause is sufficient to make an arrest in one's private dwelling place. A

police officer has probable cause for an arrest when he "has reasonable grounds to believe that the person is committing or has committed an offense." (Ill. Rev. Stat. 1973, ch. 38, par. 107-2(c).) In determining whether there are reasonable grounds to believe that a person has committed an offense, a court must consider all of the circumstances known to the police officer at the time of the arrest. (People vs. Clay (1973), 55 Ill. 2d 501, 304 N.E. 2d 280.) In considering these circumstances, a court must not be unduly technical because the question of probable cause involves probabilities and not certainties. Clay.

At the time of Bean's arrest, Officer Lahm knew from his conversation with Brimingham that a Jimmy Bean had fled the scene of the armed robbery with three other men. He also knew from his conversation that this Jimmy Bean was 17 or 18 years old, lived in the vicinity of

Keeler (4200 West) and Gladys, and had gone to school with Brimingham at one time. He had discovered form the police alpha file that a Jimmy Bean had gone to a school at Van Buren and Keeler and had listed 4211 West Gladys as his address. We believe that on the basis of all of this information, Lahm had probable cause to arrest the Jimmy Bean living at 4211 West Gladys.

Defendants claim that the information provided by Birmingham was no a sufficient basis for a finding of probable cause in this instance. They argue that the information provided by Birmingham was not reasonably trustworthy because it was obtained by telephone and there was no proof that Lahm was actually speaking to Birmingham and because there was no proof of her reliability. We reject this claim. Although Officer Lahm did not check a telephone directory to make

certain that the number which he called was actually listed to Brimingham, we do not believe that his failure to do so detracts from the sufficiency of the information obtained for probable cause purposes. As we have already noted, the question of probable cause involves probabilities. Information recevied over the telephone has in the past been found sufficiently reliable to form some of the basis for a finding or probable cause. (People v. Lucus (1968), 41 Ill. 2d 370 243 N.E. 2d 228.) In the instant case, the information received over the telephone came from a person who had winessed the flight from the scene of the armed robbery. This person clearly identified hereself to the police, giving her name, address, and telephone number. She told Lahm that she had gone to school with one of the men fleeing the scene and she knew that he lived in the vicinity of Keeler and Glayds. She said that the man

was Jimmy Bean. Afterwards, Lahm corroborated some of this information by checking the police alpha file and visiting schools in the area. This corroboration supported the reliability of the earlier acquired information. We conclude that the information provided by Birmingham, being strong and positive and being corroborated in certain respects, was more than sufficient basis for the finding of probable cause.

In answer to defendants' argument that there was no proof that Birmingham was not a professional informat, needing more corroboration, we simply note that there is nothing in the record to indicate the Birmingham was nothing but an ordinary citizen. (People v. Padilla (1979), 70 Ill. App. 3d 406, 387 N.E. 2d 985.) As a ordinary citizen, her prior reliability need not be established. People v. Hoffman (1970), 45 Ill. 2d 221, 258 N.E. 2d 326.

The second part of the State's first

contention is whether probable cause alone is sufficient to make an arrest in one's private dwelling place. The police in this case entered Bean's apartment and made the arrest without a warrant.

The law with respect to this question is in a state of uncertainty due to the fact that the United State's Supreme Court has yet to directly answer this question. (See People v. Wolgemuth (1977), 69 Ill. 2d 154, 370 N.E. 2d 1067, 1069-70, for a listing of Supreme Court cases specifically reserving this question.)[1]

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[1] There are presently two cases before the Supreme Court involving this question. (Payton v. New York, Docket NO. 78-5420 and Riddick v. New York, Docket No. 78-5421.) Although arguments were heard on March 26 1979, the Court has rodered the cases on March 26, 1979, the Court has ordered the cases to be reargued, perhaps in the next term.

Several Federal courts of appeal, however, have indicated that warrantless arrests within one's private dwelling place may be unconstitutuional absent exigent circumstances. (See Wolgemuth, 69 Ill. 2d at 159-60, 370 N.E. 2d at 1070, for a listing of the cases.) In Illinois, the supreme court has seemingly indicated that it will only require probable cause in cases involving arrests in private dwellings. (See e.g., People v. Clay (1973), 55 Ill. 2d 501, 304 N.E. 2d 280; People v. Johnson (1970), 45 Ill. 2d 283, 259 N.E. 2d 57), but even in those cases exigent circumstances were arguably present. (See People v. Abney (1978), 50 Ill. App. 3d 54, 55-56, 373 N.E. 2d 861, 862, appeal allowed (1978), 71 Ill. 2d 603, for a listing of the exigent circumstances present in the leading supreme court cases.) Illinois appellate court cases indicate a number of different approached to the

problem. Some cases have indicated that mere probable cause is requied, although the factual context of the cases indicates that exigent circumstances also are arguably present. (See e.g., People v. Bailey (1978), 60 Ill. App. 3d 1046, 377 N.E. 2d 273; People v. Addison (1977), 56 Ill. App. 3d 92, 371 N.E. 2d 1025.) Some cases have indicated that the area is uncertain, and, although the factual contexts of these cases contain exigent circumstances, these cases have not stated that a warrantless arrest will only be justified when exigent circumstances are present (See e.g., People v. Taylor (1979), 68 Ill. App. 3d 776, 386 N.E. 2d 555; People v. Denwiddie (1977), 50 Ill. App. 3d 184, 365 N.E. 2d 978.) Some cases have recognized the uncertainty but have required more than mere probable cause. (See e.g., People v. Trull (1978), 64 Ill. App. 3d 385 380 N.E. 2d 1169; People v. Abney (1978) 58,

Ill. App. 3d 54, 373 N.E. 2d 861, appeal allowed (1978), 71 Ill. 2d 603.) Absent any clear guideline form the United States or Illinois Supreme Court, we agree with the appellate court for the fourth district that "the law must develop on a case basis." Abney, 58 Ill. App. 3d at 56, 373 N.E. 2d at 862.

In evaluating the arrest in this case, we think it helpful to utilize the factors which were originally suggested in Dorman v. United States (D.C. Cir. 1970), 435 F. 2d 385, as factors to be considered in determining whether exigent circumstances existed. In so doing, however, we point out that we are not stating that exigent circumstances are a constitutional requirement. The factors suggested by Dorman include a consideration of (1) the quality of the information which formed the probable cause for the arrest; (2) the nature of the offense charged; (3) the

danger that the suspect might be armed; (4) the strength of the belief that the suspect is in the premises being entered; (5) the nature of the entry into the building; (6) the time of entry; and (7) the likelihood that the suspect will escape.

The quality of the information which formed the probable cause for Bean's arrest was very high. Lucinda Birmingham, a clearly identified citizen and a former classmate of Bean, recognized him running from the cleaners with two men who had come form the cleaners, only moments after the armed robbery had occurred. Although she did not know exactly where Bean lived, she was able to tell officer Lahm that he lived in the vicinity of Keeler and Gladys. Subsequent investigation by Officer Lahm revealed that a Jimmy Bean who had gone to school in the area was listed as residing at 4211 West Gladys, which could not have been more than six

houses from the corner of Glayds and Keeler.

The offense charged was a violent crime. There was testimony at one of the hearings that the two individuals who actually went into the cleaners carried a sawed-off shotgun and a pistol. Although the danger that Bean was armed might appear to be slight in the light of Lahm's testimony that he did not draw his gun in the apartment because he did not know if Bean would be armed, the guns had not been accounted for at that time. Also, Lahm never indicated whether his partner had drawn his gun and, in fact, Mrs. Bean had testified that one of the officers did drawn his gun in the apartment. Although there is no testimony that the police officers had checked with neighbors to see if Bean was still living at 4211 West Gladys, we think that there was sufficient reason to believe that he was in fact living there.

Lahm had acquired information that a Jimmy Bean had been listed as living at 4211 West Gladys and that he was either 17 or 18 years of age. We particularly think that the information that Bean was 17 or 18 suggests that he would still be living at home. Also we believe that the early hour of entry by the police gives them reason to believe that Bean would be home. (People v. Trull (1978), 64 Ill. App. 3d 385, 380 N.E. 2d 1169.) Moreover, we observe that Mrs. Bean told the police that he was there after she had allowed them into either her apartment or the vestibule of her apartment.

The police officers entered the apartment only after they knocked, announced their presence, and were invited in by Mrs. Bean. An invitation into a private dwelling, of course, eliminates any problem with the legality of the entry. (People v. Johnson (1979), ___ Ill. App. 3d ___, 388 N.E. 2d 1320.) Although it is

true that there is a dispute as to the extent of the invitation, this case does not present facts which indicate the type of entry which has been criticized elsewhere. (Abney.) Also, the time of entry was 8 a.m. Although an argument can be made that an 8 a.m., entry is as reprehensible as a nightime entry, a number of cases would seem to indicate that there is a significant difference between entry during the daytime hours and entry at night. Compare People v. Addison (1977), 56 Ill. App. 3d 92, 371 N.E. 2d 1025, and People v. Denwiddie (1977), 50 Ill. App. 3d 184, 365 N.E. 2d 978, to Abney and Dorman.

The last factor to be considered is the likelihood that Bean would flee. There is no evidence indicating that Bean ever resisted his arrest or attempted to flee. In fact, if he had attempted to flee, he probably would have been un-

successful since there were police officers stationed in the rear of the apartment. Nonetheless, even conceding that there was no likelihood of Bean fleeing, we believe that on balance the Dorman factors wuld be satisfied in this case. Denwiddie.

Defendants argue that a warrant should have been obtained because the police had time to obtain an arrest warrant. In People v. Johnson (1970), 45 Ill. 2d 283, 259 N.E. 2d 57, an investigation had begun to focus on defendant at least one month before his arrest. Nevertheless, the police did not have a warrant when they arrested him in his apartment. Despite the absence of a warrant, the court found the arrest to be legal. In the instant case, Lahm obtained information from Birmingham on March 6. Although he conducted some investigation after that date, it is conceivable that he could have obtained a warrant before March 13.

Yet, in light of the circumstances of this case, we do not believe the absence of a warrant here effects the validity of the arrest. See generally People v. Helms (1978), 67 Ill. App. 3d 729, 385 N.E. 2d 127.

We reverse and remand the judgment of the trial court regarding the legality of Bean's arrest and statements and instruct the trial court to conduct a hearing on the voluntariness of Bean's statements and then proceed with the course of the trial.

II

The State's second contention is that the trial court's ruling on the Byrds' motion to quash their arrests and suppress their identifications should be reversed since it was based on an erroneous ruling that Bean's arrest was illegal. It is clear that the court's ruling on the Byrds' motion was predicated on the ruling in the Bean case. Since

we reverse the trial court's ruling in the Bean case, we also must reverse the court's ruling in the Byrd case. We are aware, however, that our decision to reverse the Byrd case does not resolve the question of whether by Byrds' arrests were legal. They claim that their arrests were illegal because they were made in their home without a warrant. The stipulation of the parties did not indicate that the Byrds were arrested in their home. It indicated only that the Byrds were arrested at 4132 West Van Buren. The parties' stipulation also did not mention any of the circumstances surrounding the arrest. Absent some record of the circumstances, we cannot say whether the arrests were legal.

Therefore, pending the outcome of the trial court's proceedings on the question of the voluntariness of Bean's statements, we intruct the trial court

to conduct a hearing on the circumstances of the circumstances of the Byrds' arrests.

Reversed and Remanded.

LORENZ AND MEJDA, JJ., concur.